United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ affidavit of mailing

75-1007

To be argued by
PAUL B. BERGMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1007

UNITED STATES OF AMERICA,

Appellee,

—against—

PATRICK J. McDONOUGH,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York

PAUL B. BERGMAN,
Assistant United States Attorney,
of Counsel.

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Preliminary Statement

Appellant Patrick J. McDonough appeals from an order and judgment of the United States District Court for the Eastern District of New York (Edward R. Neaher, *J.*) entered December 9, 1974, denying his motion to vacate a judgment of conviction and dismiss the indictment because of the alleged failure of the Government to comply with the Plan for Achieving Prompt Disposition of Criminal Cases (the "Plan"). Appellant had been sentenced to a three year term of imprisonment on the underlying conviction which had been for possessing and uttering counterfeit $10 Federal Reserve Notes, in violation of Title 18, U.S.C., § 472. Sentence was suspended and appellant was placed on probation for a period of three years.

On this appeal, the sole issue presented is whether the Government timely filed the Notice of Readiness.

Statement of Facts

A. Prior Proceedings

Appellant was originally convicted, after a non-jury trial before Judge Neaher, of uttering three counterfeit ten dollar Federal Reserve Notes, in violation of Title 18, U.S.C. § 472. Judgment was entered on April, 1974 and appellant subsequently appealed. On August 12, 1974 this Court heard oral argument and on October 3, 1974, remanded the case to the District Court for a hearing to determine if the Government had complied with the Plan. *United States* v. *McDonough*, 504 F.2d 67 (2d Cir. 1974). That hearing was held on November 22, 1974.

B. The Hearing

At the hearing it was agreed that appellant was arrested May 13, 1973 and that the Government's Notice of Readiness was filed on Monday, November 19, 1973.

Agent Caputo, a Special Agent with the United States Secret Service, testified that appellant had agreed to cooperate with the Government shortly after his arrest (23-25)* and that this cooperation lasted for some three weeks, ending approximately the first week of June, 1973 (29). During this period Agent Caputo spoke with appellant approximately four times on the telephone (28).

On October 31, 1973 a "Notice of Pleading" was mailed to appellant at 121 Newbridge Road, Hicksville, L.I., which was the address supplied by appellant at the time of his arrest and arraignment, to the Government. The notice informed him that he was required to appear November 9,

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* Page references in parenthesis refer to the pages in the hearing transcript of November 22, 1974, reproduced in full in the Government's Appendix.

1973 to enter his plea to the indictment.* On November 5, 1973, the "Notice of Pleading," in its original envelope, was returned to the Office of the United States Attorney by the United States Postal Service, with a stamped notation that there was no one at that address by the name of "Patrick J. McDonough". It was then remailed, along with the original envelope, to 26 Marvin Avenue, in the care of James McDonough, appellant's brother, Hicksville, Long Island (62).

On November 9, 1973, counsel for the Government and the appellant appeared before Judge Neaher for pleading. Appellant failed to appear. Thereafter, on November 14, 1973 appellant appeared in court and entered a plea of not guilty to the indictment (15). The notice of readiness was filed on Monday, November 19.

Following the hearing, Judge Neaher found that the Government was entitled to a three-week excludable period under the Plan while appellant was cooperating with the Government (69-75), and to a five-day excludable period, November 9 through November 14, for the time that appellant was unavailable to the Government (75-76). Accordingly, the District Court ruled that the Government's notice of readiness had been timely filed.

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* Counsel for appellant, the Legal Aid Society, was also notified by mail of the November 9 pleading date.

ARGUMENT

POINT I

The three week period during which appellant cooperated with the Government was properly excluded by the District Court.

During the course of cross-examining Agent Caputo, appellant's counsel sought to establish that Caputo's conversations with appellant occurred after counsel had been assigned following the May 14th arraignment. Government counsel conceded that they had and Caputo testified that he had not personally spoken with defense counsel (36-37). When pressed by the court to explain the significance of all this, defense counsel protested ". . . that Mr. Caputo should have been in contact with Mr. McDonough's attorney so that Mr. McDonough could have agreed or not agreed or whatever the situation was with respect to cooperation after speaking with his attorney" (37). Counsel, however, was content to establish that Caputo had never spoken with appellant's counsel and asked no further questions of him at that time (*id.*). Shortly thereafter, appellant's counsel directed a flurry of questions to Caputo concerning any reports by Caputo to the Assistant United States Attorney during the period of appellant's cooperation (45-47). She then asked Caputo if it was ". . . the usual procedure of the Secret Service in cases of this type to speak with the counsel of the defendant who is cooperating?" (47). When an objection was made by Government counsel, defense counsel responded that a "defendant has the right not to be telephoned or feel compelled to telephone an agent or Government official without his lawyer being involved in the process." (47). When Government counsel stated that "the only issue is whether or not the defendant was co-

operating," the District Court noted its agreement (47-48). Defense counsel then stated:

> "I object to your Honor's ruling and I will refrain from asking any further questions." (48).

Recently, in *United States* v. *Brown,* — F.2d — (2d Cir. slip opinion, 1847, 1855; February 20, 1975), Judge Medina observed:

> "At times, especially in criminal cases, an utterly insignificant colloquy is blown up to make it look like a legitimate point for reversal."

Judge Medina's observation is equally applicable to this case. In the year and a half in which this prosecution had been pending, appellant never once raised the contention that either the spirit or the rule of *Massiah* v. *United States,* 377 U.S. 201 (1964), had been violated in this case. Those proceedings included the full course of discovery prior to the trial, the trial itself and an appeal to this Court. Throughout, appellant was represented by the same counsel and, one must assume, was in consultation with counsel. Not once, throughout that period of time, had any charge been made that appellant's cooperation with the Government was anything less than usual and, with the knowledge of defense counsel.

Against that background, at the hearing this past November on this court's remand, appellant managed to insinuate into the record the utterly insignificant fact that Agent Caputo had no conversations with defense counsel. Prior to that, counsel had submitted no memoranda of law to the Court explaining, let alone supporting appellant's position. Moreover, during the colloquy which preceded the taking of testimony, no hint was given to the District Court of appellant's theory under the *Massiah* case.* More-

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* Although appellant's counsel liberally set forth appellant's position concerning the mailing delay in the case, counsel simply stated that the cooperation issue was "in dispute" (13).

over, no affidavit was submitted by Edward Kelly, the Legal Aid Society attorney who represented appellant at the time in question, in which it was stated that he had no knowledge of appellant's cooperation with the Government. Of course, the presentation of the claim at the hearing itself was no less desultory and was quickly abandoned. Suffice it to say that the two persons who were most qualified to testify as to a violation of *Massiah*, appellant and Mr. Kelly, were never called as witnesses.

We cannot understand how the foregoing record establishes, as a factual matter, a violation of *Massiah*. Indeed, the paucity of the record is so glaring, that appellate counsel has been forced to miscast the record in order to create a semblance of an argument. Thus, even though the matter was never explored by calling Mr. Kelley, appellant now implies that the Government has "conceded" that defense counsel never knew of appellant's cooperation (Br., pp. 4, 9).* In short, although it is remotely possible that Mr. Kelly may have been unaware of appellant's cooperation with the Government, this record hardly establishes that fact, and, consequently, does not provide the factual predicate for appellant's arguments concerning *Massiah*.

But even if we were to assume that Mr. Kelly had not learned, at the arraignment, that appellant wished to co-

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* Appellant states:

> The Government conceded that these conversations went on "after Mr. McDonough was assigned counsel" without any effort being made to notify counsel (36-37)" (Br., 4);
> The Government conceded that these conversations went on "After Mr. McDonough was assigned counsel" without any effort being made to inform counsel of their occurrence." (Br., 9)

These statements are neither technically accurate, because the concession was never so far reaching in scope, nor accurate in the implication, for the record is completely barren on whether defense counsel knew that appellant was cooperating.

operate with the Government, appellant has cited no authority which supports his assertion that the exclusionary rule commanded by *Massiah* should be applied to non-evidentiary incidents of the violation. Appellant's claim with respect to *Massiah* is far too attenuated. See *United States* v. *Messina*, — F.2d — (2d Cir. slip opinion, 663, 668-669; December 10, 1974). No court has gone so far in punishing the Government. Moreover, in any event, it is difficult to fathom any violation of *Massiah* in the case of a cooperating defendant. See, *United States* v. *Messina*, *supra*; *United States* v. *Gaynor*, 472 F.2d 899, 900 (2d Cir. 1973).

POINT II

The five day delay occasioned by appellant's change in mailing address brought the Government into compliance.

We do not agree with appellant that the delay occasioned by the mailing does not bring the Government into compliance. To the contrary, it does bring the Government into compliance, albeit by the narrowest of margins.* Rule 45(a) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> (a) *Computation.* In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

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* We have no occasion, therefore to concern ourselves with the apparent conflict between the prior decision in this case and *United States* v. *Bowman*, 493 F.2d 594, 598 (2d Cir. 1974), on the issue of *de minimis* time periods of non-compliance.

Under the Rule, appellant's arrest date, May 13, must be excluded. Accordingly, the month of May yields 18 days. There follows five full months. In November, taking the five day excludable period from November 9 to November 14, we are left with eight days at the start of the month which, added to the 18 outstanding days from May, totals 26 days. Accordingly, following November 14, the last day of the five day excludable period, the Government had until November 18, a Sunday, on which to file the Notice of Readiness. Of course, under Rule 45(a), it had until Monday to file, which it did.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

March 24, 1975

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
Assistant United States Attorney,
*of Counsel.**

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* The United States Attorney's Office wishes to acknowledge the assistance of Jon M. Lewis in the preparation of this brief.

★ U. S. Government Printing Office 1975— 614—248—92

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 26th day of March 19 75 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

William J. Gallagher, Esq.
The Legal Aid Society
~~Federal Defender Services Unit~~
509 United States Courthouse
Foley Square, New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

26th day of March 19 75

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977